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# THE LEGACY OF TOO LITTLE, TOO LATE: THE INCONSISTENT TREATMENT OF POSTPARTUM PSYCHOSIS AS A DEFENSE TO INFANTICIDE

Colleen Kelly

“No one believed me when I said my brain was being dissolved, and that I needed scans, treatments, and tests done immediately. Now I can no longer tell you.”<sup>1</sup>

## I. INTRODUCTION

A young mother, Melanie Stokes, throws herself off a twelfth-story window ledge in Chicago on June 11, 2001.<sup>2</sup> A Houston housewife, Andrea Yates, methodically drowns her children in the bathtub of her suburban home on June 20, 2001.<sup>3</sup> What connects the two tragedies? One woman is dead and one faces life imprisonment.<sup>4</sup> Both women reportedly suffered from postpartum psychosis.<sup>5</sup> The general public and the medical community are woefully uninformed about the illness. Although postpartum psychosis occurs in approximately one to four of every 1,000 women who give birth,<sup>6</sup> and up to eighty percent of new mothers experience some level of depression postpartum,<sup>7</sup> relatively little is known about the exact causes, symptoms and treatments for postpartum depressive disorders.<sup>8</sup> Postpartum depression is more common than

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1. From the diary of Melanie Stokes, read by her family on *The Oprah Winfrey Show: Postpartum Depression* (ABC television broadcast, Nov. 7, 2001), available at <http://www.tapesandtranscripts.oprah.com>.

2. Sen. Richard Durbin, *Statements on Introduced Bills and Joint Resolutions* (Oct. 11, 2001), available at <http://thomas.loc.gov/cgi-bin/query/D?r107:2:./temp/~r107G76jZT:b54397>: [hereinafter *Durbin Statements*].

3. Teresa Mask, *Avoiding Tragedy: How to Treat Postpartum Depression*, CHICAGO DAILY HERALD, June 22, 2001, at 1.

4. Julie Cart, *Houston Mother Ruled Competent to Stand Trial*, L.A. TIMES, Sept. 23, 2001, at A1.

5. *Id.* See also *Durbin Statements*, *supra* note 2.

6. Todd Ackerman, *Postpartum Depression's Role Doubted*, HOUSTON CHRONICLE, June 21, 2001, at A19.

7. Lawrence Kruckman, *An Introduction to Postpartum Illness*, POSTPARTUM SUPPORT INTERNATIONAL, (2003), at <http://www.postpartum.net/posttrial2.htm>.

8. *Id.*

gestational diabetes, preeclampsia and preterm delivery, yet it has received far less attention in medical research than any of these conditions.<sup>9</sup> In fact, the psychiatric community only recently classified postpartum depressive disorders as independent disorders.<sup>10</sup> Consequently, women like Melanie Stokes and Andrea Yates are not receiving the help they need, help that could prevent these kinds of tragedies in the future.<sup>11</sup>

While the medical community has been slow to validate postpartum depressive disorders, the legal community has been inconsistent in its treatment of infanticidal<sup>12</sup> mothers who mount insanity defenses based on these disorders.<sup>13</sup> Unlike a number of other countries,<sup>14</sup> the United States has neither a state nor federal statute that specifically addresses infanticide. In the United States, infanticide falls under general homicide

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9. Kathryn A. Leopold & Lauren B. Zoschnick, *Postpartum Depression*, WOMAN'S PRIMARY HEALTH GRAND ROUNDS AT THE UNIVERSITY OF MICHIGAN, 2003, at <http://obgyn.net/femalepatient/default.asp?page=leopold>.

10. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 386 (4th ed. 1994) [hereinafter DSM IV]. "Postpartum depression is not recognized by the DSM IV as being diagnostically distinct from its nonpuerperal counterpart, although DSM IV does allow the addition of a postpartum-onset specifier for patients with an onset within four weeks of delivery." C. Neill Epperson, *Postpartum Major Depression: Detection and Treatment*, AMERICAN FAMILY PHYSICIAN, (April 15, 1999), at <http://www.aafp.org/afp/99041/sap/2247.html>. A thorough description of the evolution of the medical community's understanding of postpartum disorders is beyond the scope of this Comment.

11. See generally C. DIX, *THE NEW MOTHER SYNDROME* (1985).

12. Infanticide is defined as "the act of killing a newborn child, esp. by the parents or with their consent" BLACK'S LAW DICTIONARY 781 (7th ed. 1999). For the purpose of this comment, infanticide refers to the killing of one's own child or children, whether newborn or not. A thorough history of infanticide laws in England and America is outside the scope of this comment; See Christine A. Gardner, Note, *Postpartum Depression Defense: Are Mothers Getting Away with Murder*, 24 NEW. ENG. L. REV. 953, 955-961 (1990); Brenda Barton, Comment, *When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers*, 51 SMU L. REV. 591, 593-598 (1998).

13. "[C]ourts differ in their reliance on evidence of postpartum psychiatric disorders. As more women have introduced this evidence, the disparity in court decisions has become more pronounced." Amy L. Nelson, Comment, *Postpartum Psychosis: A New Defense?*, 95 DICK. L. REV. 625, 630 (1990).

14. See *infra* notes 191-196 and accompanying text.

statutes, which vary from state to state.<sup>15</sup> Postpartum psychosis is not an independently recognized defense in any American jurisdiction; rather, it can form the basis for an insanity or diminished capacity defense. The legal standard for insanity and diminished capacity, where applicable, also varies.<sup>16</sup> Additionally, some jurisdictions allow for a "guilty but mentally ill" verdict.<sup>17</sup> Due to the lack of nationwide uniformity, infanticidal mothers who assert postpartum psychosis in their defense experience vastly disparate results. One might as well flip a coin to predict whether the penalty for such a crime is counseling and probation, or the death penalty.

This Comment examines postpartum psychosis as a defense in infanticide cases by charting its inconsistent treatment, exploring the inherent difficulties in mounting the defense and advocating a long overdue validation of the disorder under the law. Part One defines Postpartum Depressive Disorders and describes the symptoms, likely causes, and risk factors. Part Two surveys insanity law in general, and how postpartum psychosis fits into that framework, discussing specific cases where postpartum psychosis, the most severe postpartum depressive disorder, has been asserted. Part Three analyzes and comments on the current law, comparing Postpartum Psychosis with other mental illness defenses, and recommends a more uniform treatment of postpartum psychosis under the law. Part Four sets forth a plan of action to diagnose and treat the disorder, in an effort to avoid future tragedies.

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15. For example, *compare* CAL. PEN. CODE § 187(2001), KY. REV. STAT. ANN. § 507.010(2001), MONT. CODE ANN. § 45-5-102(2001), and UTAH CODE ANN. § 76-5-201(2001).

16. See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (2d ed. 1995). See also *infra* notes 108-115 and accompanying text..

17. See ALASKA STAT. §§ 12.47.030-12.47.050 (Michie 1986); DEL. CODE ANN. tit. 11, § 401(b) (1996); GA. CODE ANN. § 17-7-131(b)(1)(D) & (2)(1992); ILL. REV. STAT. 720/516-2(c)(1993); IND. CODE ANN. §§ 35-36-2-3(4) and 35-36-2-5 (West 1986); MD. CODE ANN., HEALTH-GEN. I § 12-110 (1994); MICH. COMP. LAWS ANN. § 768.36 (1997); MISS. CODE ANN. § 99-13-9 (1972); N.M. STAT. CODE ANN. § 31-9-3 (Michie 1978); PA. STAT. ANN. tit. 18, § 314 (West 1983); S.C. CODE ANN. § 17-24-20 (Law. Co-op. 1989); S.D. CODIFIED LAWS § 23-A-7-2, 23-A-7-16 (Michie 1995); see also Debra T. Landis, Annotation, *Guilty But Mentally Ill Statutes: Validity and Construction*, 71 A.L.R. 4th 702, 702-797 (1990).

## II. DEFINING POSTPARTUM DEPRESSION DISORDERS

### A. Women and Depression Generally

Mental disorders cut across all parts of society. There is evidence, however, that one group is more likely to suffer than others. Research shows that women experience depression at roughly twice the rate of men.<sup>18</sup> According to the National Institutes of Health, "[t]his two-to-one ratio exists regardless of racial and ethnic background or economic status."<sup>19</sup> Women are more prone to depression during and after pregnancy than during any other time in their lives.<sup>20</sup> As Dr. C. Neill Epperson of the Yale University School of Medicine noted in a recent article for the American Academy of Family Physicians, "the peak age of incidence of depression, 18 to 44 years, coincides with the prime childbearing years."<sup>21</sup> Before one can examine postpartum psychosis as a defense, it is necessary to place the disorder in the proper context.

### B. Postpartum Depressive Disorders

Postpartum depression is a general term used to describe a wide variety of disorders a woman may experience after giving birth.<sup>22</sup> Far from being a new phenomenon, postpartum depressive disorders were first noticed and described by Hippocrates in the fourth century B.C.<sup>23</sup> In the 1850s, the French doctor Louis Victor Marce conducted the first comprehensive study of postpartum medical maladies.<sup>24</sup> These illnesses are real, and often as debilitating, as diabetes or heart disease.<sup>25</sup> The three generally

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18. NATIONAL INSTITUTES OF HEALTH, PUB. NO. 00-4279, DEPRESSION: WHAT EVERY WOMAN SHOULD KNOW 1 (2000) available at <http://www.nimh.nih.gov/publicat/depwomanknows.pdf>.

19. *Id.* at 6.

20. *Id.* at 8,9.

21. Epperson, *supra* note 10, at 1.

22. POSTPARTUM RESOURCE CENTER OF NEW YORK, *Learning About Postpartum Depression* (2000), at <http://www.postpartumny.org>.

23. SHARON L. ROAN, POSTPARTUM DEPRESSION: EVERY WOMAN'S GUIDE TO DIAGNOSIS, TREATMENT AND PREVENTION 24 (1997).

24. *Id.* at 24. Dr. Marce noted that symptoms included "melancholy, anemia, weight loss, constipation...menstrual abnormalities...confusion, faulty memory, and foggiess." *Id.* The Marce Society is an international society for the prevention and awareness of postpartum depressive disorders named after Dr. Marce. See <http://www.marcesociety.com/>.

25. AMERICAN FAMILY PHYSICIAN, *Postpartum Depression and the "Baby Blues"*, April 15, 1999, at <http://www.aafp.org/afp/990415ap/990415e.html> (an

recognized categories of postpartum disorders include: the “baby blues”, postpartum depression and postpartum psychosis.<sup>26</sup>

### 1. The “Baby Blues”

It is estimated that sixty to eighty percent of new mothers experience this lowest level of postpartum psychological disturbance, known as the “baby blues.”<sup>27</sup> Onset typically occurs within one to three days of delivery and symptoms last between a few days to a maximum of two weeks.<sup>28</sup> The new mother may experience mood swings and weepiness,<sup>29</sup> in addition to any of the following: lack of sleep, fatigue, food cravings or lack of appetite, feelings of anxiety, irritability, oversensitivity, confusion, nervousness, sadness, inferiority and a lack of interest in the baby.<sup>30</sup> The “baby blues” is the most common and least serious form of postpartum depression.

### 2. Postpartum Depression

Postpartum depression is much more serious and debilitating than the “baby blues.” Approximately ten to twenty-five percent of all new mothers experience postpartum depression.<sup>31</sup> Symptoms typically occur a few weeks after delivery, and can last up to a year.<sup>32</sup> The new mother experiences all of the symptoms of the “baby blues” but at a higher severity. They may also experience several of the following symptoms: headaches, numbness, tingling in limbs, mild chest pains, hyperventilation, feelings of despair and inadequacy, an inability to cope, hopelessness, an obsession with the baby’s health, impaired concentration or memory, loss of normal interests, thoughts of suicide, bizarre thoughts, panic attacks,

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article directed towards patients, published in conjunction with Dr. Epperson’s article, *supra* note 10).

26. *Id.* For more complete descriptions of the disorders and of diagnosing the symptoms, see the following: ANN L. DUNNEWOLD, PHD., EVALUATION AND TREATMENT OF POSTPARTUM EMOTIONAL DISORDERS (1997), LAURA J. MILLER, MD., ED., POSTPARTUM MOOD DISORDERS (1998); ARLENE M. HUYSMAN, A MOTHER’S TEARS: UNDERSTANDING THE MOOD SWINGS THAT FOLLOW CHILDBIRTH (1998), DEBORAH SICHEL & JEANNE WATSON DRISCOLL, WOMEN’S MOODS (2000).

27. POSTPARTUM RESOURCE CENTER OF NEW YORK, *supra* note 22.

28. Bob Condor, *In the Shadows of Birth*, CHI. TRIB., June 27, 2001, at 1.

29. Mask, *supra* note 3, at 1.

30. Kruckman, *supra* note 7.

31. POSTPARTUM RESOURCE CENTER OF NEW YORK, *supra* note 22. See also SICHEL & DRISCOLL, *supra* note 26, at 205.

32. SICHEL & DRISCOLL, *supra* note 26, at 205.

hostility, new fears or phobias, hallucinations, nightmares, extreme guilt and a total lack of feeling for the baby.<sup>33</sup> These symptoms can be persistent and debilitating, causing the mother difficulty in performing daily activities.<sup>34</sup>

### 3. Postpartum Psychosis

Postpartum psychosis is the most severe and dangerous form of postpartum depressive disorders, afflicting approximately one to four of every 1,000 women who give birth.<sup>35</sup> Onset usually occurs within the first three months after the birth, with eighty percent of all cases appearing within three to fourteen days.<sup>36</sup> This devastating illness is characterized by a loss of contact with reality for an extended period of time and includes hallucinations, delusions, hearing voices and rapid mood swings.<sup>37</sup> The auditory and visual hallucinations may center around violence towards one's self and the baby.<sup>38</sup> This comment focuses on the use of postpartum psychosis as a defense in infanticide cases and argues that a sufferer should not be held criminally responsible for her actions.

#### C. The Children of Postpartum Depressive Mothers

It is important to note that the mother who suffers from a postpartum depressive disorder is not the only victim. The *Yates* case, and others like it, demonstrates that infanticide can be a result of postpartum psychosis. However, even if children are not victims of violence at the hands of a postpartum depressed mother, they may suffer in other ways. These disorders can have other significant and permanent effects on a newborns' cognitive, social and emotional development.<sup>39</sup> The legal community must

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33. Kruckman, *supra* note 7.

34. Condor, *supra* note 28 (Dr. Lisa Rone, a psychiatrist at Northwestern University Medical School whose private practice has a major focus upon postpartum depression patients, describes the phenomenon this way: "[s]ome women might get up and follow their daily routines but they have to work so hard to do things like shop for groceries, plan child care, or even take a shower."). See also Susan H. Greenberg & Karen Springen, *The Baby Blues and Beyond*, NEWSWEEK, July 2, 2001, at 26; Ackerman, *supra* note 6.

35. Ackerman, *supra* note 6.

36. *Id.*

37. POSTPARTUM RESOURCE CENTER OF NEW YORK, *supra* note 22.

38. Leopold & Zoschnick, *supra* note 9.

39. Melissa Healy, *In Depression's Shadow; the Emotional Well-being and Intellectual Growth of Children Can Be Profoundly Stunted By Their Mother's*

be educated about all the ramifications of postpartum depressive disorders. Only then can our legal system begin to treat suffering mothers who commit violent crimes in a just and humane manner.

#### *D. Etiology and Risk Factors for Postpartum Depressive Disorders*

The psychiatric community is divided in their characterization of the specific causes of these disorders.<sup>40</sup> A consensus of doctors believe these disorders are caused by complex interactions among biological, psychological and social factors, that may affect each sufferer differently.<sup>41</sup> Contemporary research has centered on the psycho-biological responses a postnatal woman undergoes, principally the vast hormonal fluctuations brought on by pregnancy and delivery.<sup>42</sup> Estrogen and progesterone levels rise significantly during pregnancy. Soon after delivery, these levels return to pre-pregnancy amounts.<sup>43</sup> These drastic fluctuations may produce chemical changes in the brain that may trigger depression.<sup>44</sup> One obstetrician- gynecologist (OB-GYN) remarked “[Childbirth produces] more pronounced changes than at any time other than death.”<sup>45</sup> Although research has intensified somewhat in the last ten years due to the number of high profile trials where postpartum psychosis was an issue, there is still no definitive culprit for the disorders.<sup>46</sup>

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*Mental Illness*, L.A. TIMES, Sept. 17, 2001, at D1. A thorough discussion of the possible effects on a child of a mentally ill mother is outside the scope of this Comment. See also Liza N. Burby, *Joy Derailed: Getting Back on Track After the Agony of Postpartum Depression*, NEWSDAY, Sept.11, 2001, at B10 (noting such babies tend to be inconsolable and withdrawn, and more prone to having lower IQs, behavioral problems and language delays); Condor, *supra* note 28 (quoting a specialist in postpartum depression as saying “the most common consequences are poor bonding with the baby and marital problems, which can end in divorce.”).

40. Kruckman, *supra* note 7.

41. Shaila Misri, M.D. & Margaret Duke, M.D., *Depression During Pregnancy and Postpartum*, 17 J. SOC. OBSTETRICS & GYNECOLOGY CANADA 657,657 (1995). See also, Christine Ann Gardner, *Postpartum Depression Defense: Are Mothers Getting Away with Murder?* 24 NEW ENG. L. REV. 953, 960-966 (1990). For a survey of research findings regarding biological, psychosocial, demographic, personality/interpersonal, obstetric and anthropological factors in postpartum depressive disorders, see Kruckman, *supra* note 7.

42. See SICHEL & DRISCOLL, *supra* note 26, at 196.

43. Greenberg & Springen, *supra* note 34, at 26.

44. Mask, *supra* note 3.

45. Greenberg & Springen, *supra* note 34, at 26.

46. Leef Smith, *For Some New Mothers, A Descent Into Darkness*, WASH. POST, Dec. 9, 2001, at C5.



Although the exact cause remains illusive, psychiatrists and sociologists have identified a number of factors that correlate to a higher risk for postpartum disorders.<sup>47</sup> The two factors most indicative of a woman's risk for future postpartum depressive disorders are whether she suffered previously from a postpartum depressive disorder and whether she suffered a previous depression not related to pregnancy (especially if suicide has been attempted).<sup>48</sup> Other factors that considerably increase a mother's risk include the following: a family history of depression and mental illness, a history of severe premenstrual syndrome,<sup>49</sup> low self-esteem,<sup>50</sup> dissatisfaction with the marital relationship, before, during or after pregnancy,<sup>51</sup> lack of social support systems (family, friends),<sup>52</sup> a stressful or traumatic life event occurring during the pregnancy or after childbirth<sup>53</sup> and an excessive lability of mood during pregnancy.<sup>54</sup>

Another documented correlate of depression is a negative or ambivalent attitude towards pregnancy.<sup>55</sup> Obstetric factors, such as whether a delivery was vaginal or by Caesarian section, may play a role as well.<sup>56</sup> Additional evidence suggests that early discharge from the hospital

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47. Misri & Duke, *supra* note 41, at 659.

48. *Id.*

49. AMERICAN FAMILY PHYSICIAN, *supra* note 25.

50. L.A. Hall, et al., *Self-esteem as a Mediator of the Effects of Stressors and Social Resources on Depressive Symptoms in Postpartum Mothers*, 45 NURSING RES. 231-238 (1996). This study found that symptoms of depression are thirty-nine times more likely to be seen in mothers with low self-esteem than in those who have normal levels of self-esteem. *Id.*

51. Misri & Duke, *supra* note 41, at 659. See also Michael O'Hara, *Social Support, Life events, and Depression During Pregnancy*, 43 ARCHIVES. GEN. PSYCHIATRY 569, 573 (1986).

52. Epperson, *supra* note 10.

53. *Id.* This may have been a contributing factor in the Andrea Yates case. Reportedly, Mrs. Yates' father had died soon after the birth of her fifth child. Charisse Jones, *Kids' Dad Defends His Wife: Texas Mom Could Face Death in 5 Drownings*, USA TODAY, June 22, 2001, at 1A.

54. Misri & Duke, *supra* note 41, at 659.

55. Kruckman, *supra* note 7.

56. *Id.* The sparse research in this area has offered conflicting results; some researchers believe, however, that the intrusiveness and trauma of a caesarian section makes a new mother more vulnerable to depression. J. Fisher et al., *Adverse Psychological Impact of Operative Obstetric Interventions: A Prospective Longitudinal Study*. 31 AUSTRALIAN & NEW ZEALAND J. PSYCHIATRY 728, 728-738 (1997).

puts women at an increased risk for developing postpartum depression.<sup>57</sup> Further, mothers who have previously terminated a pregnancy, miscarried or who have struggled with infertility, may be more at risk for depression.<sup>58</sup> Any number of these factors increases a woman's vulnerability for postpartum depressive disorders.

### *E. Diagnosis and Treatment*

Perhaps the most disturbing fact about tragedies stemming from postpartum psychosis is how easily they might have been avoided with rapid diagnosis and treatment. As the National Institute of Mental Health has noted, "even severe depression can be highly responsive to treatment."<sup>59</sup> In the case of postpartum depressive disorders, research shows that ninety percent of sufferers who seek treatment are successful in alleviating symptoms over time.<sup>60</sup> Rapid diagnosis and treatment is key; the earlier treatment begins, the more likely the sufferer will recover and the less likely she is to experience a recurrence.<sup>61</sup> Unfortunately, due to the inherent stigma associated with mental illness and a lack of awareness among the general public and clinical practitioners, many mothers experiencing postpartum depression go untreated.<sup>62</sup> Several studies support this theory: "A study of postnatal depressed women showed that over ninety percent realized something was wrong, however less than twenty percent reported their symptoms to a health care provider. Of this sample, only one-third believed they had postpartum depression."<sup>63</sup> If sufferers received treatment for postpartum depressive disorders earlier and more often, many tragedies might be averted.<sup>64</sup>

Treatment for these disorders is typically indistinguishable from that used on non-postpartum depression sufferers.<sup>65</sup> Although some researchers have tested therapies specific to postpartum disorders,<sup>66</sup>

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57. A. R. Hickey, *et al.*, *Early Discharge and Risk for Postnatal Depression*, 167 MED. J. AUST. 244-247 (1997).

58. Misri & Duke, *supra* note 41, at 659.

59. NATIONAL INSTITUTES OF HEALTH, *supra* note 18, at 11.

60. Condor, *supra* note 28.

61. NATIONAL INSTITUTES OF HEALTH, *supra* note 18, at 11.

62. Mask, *supra* note 3.

63. Kruckman, *supra* note 7.

64. See SICHEL & DRISCOLL, *supra* note 26, at 245-246.

65. Epperson, *supra* note 10.

66. *Id.* Research is ongoing using hormone therapy: Kruckman, *supra* note 7; Greenberg & Springen, *supra* note 34, at 26 (noting that a May 2001 study

patients are usually treated with a combination of psychotherapy and pharmacotherapy.<sup>67</sup> Postpartum depressive mothers are being treated with drugs developed to treat standard depression: selective serotonin reuptake inhibitors (SSRIs) including fluoxetine (Prozac), sertraline (Zoloft), and paxoxetine (Paxil) or monoamine oxidase inhibitors (MAOs).<sup>68</sup> For women with more serious postpartum psychosis, doctors may prescribe a mood stabilizer, such as lithium, traditionally prescribed for severe schizophrenia, in conjunction with antipsychotics and antidepressants.<sup>69</sup> Experts caution that drug therapy not be used in isolation, but rather as a part of a holistic approach that encompasses psychotherapy, support group “talk” therapy and close supervision of the patient’s physical health.<sup>70</sup>

The ability to properly treat a woman with postpartum disorders is irrelevant if the woman and her family do not recognize the symptoms and seek help, and if the woman’s doctor has not been adequately educated about postpartum depressive disorders. Although some hospitals distribute information describing the symptoms and resources available when a mother is discharged,<sup>71</sup> these hospitals are the exception, not the rule. On the whole, health care providers have inadequate information and training to diagnose and treat postpartum depressive disorders. Often the only chance a health care provider may have to spot postpartum disorders, barring a sufferer seeking treatment, is the first postpartum check-up, occurring around four to six weeks after delivery.<sup>72</sup> While many health care providers are aware of postpartum depressive disorders, they generally do not employ any specific screening mechanisms, like questionnaires.<sup>73</sup> Instead they rely only on what the mother reports in response to vague questions like “how are you doing?”<sup>74</sup> Experts cite the

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conducted by the University of Helsinki demonstrated success in treating severe postpartum depression with estrogen pills).

67. Epperson, *supra* note 10.

68. Kruckman, *supra* note 7.

69. Greenberg & Springen, *supra* note 34, at 26.

70. The typically prescribed medications reportedly are effective about eighty percent of the time, but depending on the patient, they may take anywhere from one to three weeks to “kick in”; it is therefore key that mothers identified as postpartum depressive begin other psychological and social therapies. Condor, *supra* note 28. Extensive research has been done regarding the possible dangers to the baby as the result of breastfeeding while taking such medications. Epperson, *supra* note 10.

71. Mask, *supra* note 3.

72. AMERICAN FAMILY PHYSICIAN, *supra* note 25.

73. Kruckman, *supra* note 7.

74. Mask, *supra* note 3.

continuing stigma associated with mental illness and the societal pressure on women to be good mothers and to have a strong maternal instinct as the primary roadblocks to women seeking treatment.<sup>75</sup> Specialists in postpartum mental illnesses urge doctors to be diligent about asking the right questions.<sup>76</sup>

#### F. Women and Crime Generally

Gender is among the strongest predictors of criminal behavior.<sup>77</sup> Data on arrests, self reporting and victimization consistently show that males commit significantly more crimes than females.<sup>78</sup> A recent study indicates that in terms of predicting criminal and violent behavior, biological factors (i.e., hormonal and mental disorders) have relatively more impact on females than environmental factors.<sup>79</sup> The opposite is true for males.<sup>80</sup> This is significant in terms of explaining and preventing female crime.

Homicide statistics reflect the gender gap and hint at the different motivations of male and female murderers.<sup>81</sup> Historically, men commit approximately eighty-five to ninety percent of all homicides.<sup>82</sup> Who women kill, and why they kill, differs substantially from their murderous male counterparts.<sup>83</sup> Males tend to commit crime-related or “stranger” murders, whereas women tend to kill intimates, usually husbands, boyfriends and children.<sup>84</sup> Unfortunately, homicidal females’ most common victims are their minor children. Some scholars and theorists have argued that this is a socio-cultural side effect of a paternalistic society, one that forces women

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75. *Id.* at 1. See also UNITED PRESS INTERNATIONAL, *Postpartum Often Goes Unrecognized*, June 21, 2001 (noting postpartum depression often goes unrecognized by the sufferer, or she becomes so ashamed she won’t seek medical help).

76. Condor, *supra* note 28.

77. Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 80 (1994).

78. *Id.*

79. *Id.* at 84.

80. *Id.*

81. Laura E. Reece, *Women’s Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA WOMEN’S L.J. 53, 55 (1991).

82. *Id.*

83. *Id.* at 56.

84. *Id.*

into domestic servitude.<sup>85</sup> Further, some theorists argue that if a woman commits a crime, she will be judged by a male dominated legal system.<sup>86</sup>

*G. The Statistical Relationship Between Postpartum Depressive Disorders, Family Violence and Infanticide*

Postpartum depressive disorders are statistically significant indicators in the rates of homicide and infanticide. According to the FBI, homicide trends in the U.S. bear out the following:<sup>87</sup> Women are almost nine times less likely than males to commit murder (committing 12.1% of all homicides)<sup>88</sup> and infanticide represents 38.9% of those murders committed by women.<sup>89</sup> “Among homicide offenders generally, women are more likely to commit murder within a family relationship.”<sup>90</sup> A parent was the perpetrator in sixty-one percent of all homicides of children under age five.<sup>91</sup> Mothers killed thirty percent of all children under age five murdered between 1976-1999.<sup>92</sup>

These statistics indicate that women commit infanticide more often than any other form of homicide, and children are most likely to be killed by a parent. No specific studies have cross-referenced this data with that of the incidence of postpartum depressive disorders. Anecdotally, however, a connection exists. Exact figures regarding how many infanticides occur due to postpartum psychosis are problematic for a number of reasons, including an under-reporting of infant deaths and infant deaths being

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85. For “feminist” perspectives see Reece, *supra* note 81, at 55 n.13; Denno, *supra* note 77, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) and Catharine A. MacKinnon, *Toward Feminine Jurisprudence*, 34 STAN. L. REV. 703 (1982). See also RAFTER & SANKO, JUDGE, LAWYER, VICTIM, THIEF: WOMEN, GENDER ROLES AND CRIMINAL JUSTICE (1982).

86. See generally Reece, *supra* note 81.

87. Unless otherwise noted, all statistics in the subsequent listing were drawn from JAMES FOX & MARIANNE ZAWITZ, U.S. DEPARTMENT OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf>. For an analysis of incidents of family violence, see THE FEDERAL BUREAU OF INVESTIGATION, *The Structure of Family Violence: An analysis of Selected Incidents*, (2002), available at <http://www.fbi.gov/ucr/nibrs/famvio21.pdf>.

88. Fox & Zawitz, *supra* note 87, at 40.

89. *Id.* at 41.

90. *Id.*

91. *Id.* at 77.

92. *Id.*

misreported as Sudden Infant Death Syndrome (SIDS).<sup>93</sup> However, by some estimates, mothers with postpartum psychosis kill their children in eighty to 100 cases each year in the U.S.<sup>94</sup> If these estimates are correct, postpartum psychotic mothers who commit infanticide may account for a significant percentage of the national murder rate.<sup>95</sup>

Acceptance of postpartum disorders within the medical community, and the growing research suggesting wide prevalence of the disorders have not translated into acceptance by the general public or legal community. The use of postpartum psychosis as the basis for an insanity defense in infanticide cases persists in yielding mixed results. Due to high profile cases like that of Andrea Yates, however, the legal community and the general public are becoming more familiar with these disorders.

### III. POSTPARTUM PSYCHOSIS AND INSANITY UNDER THE LAW

#### *A. An Overview of Postpartum Psychosis as Legal Insanity*

Postpartum Psychosis may form the basis of an insanity defense.<sup>96</sup> The term "insanity defense" actually encompasses three different types of defenses, or uses, depending on the factual circumstances and the law of the governing jurisdiction:<sup>97</sup> (1) complete defenses (which typically result in total acquittal); (2) partial defenses; and (3) mitigating factors.<sup>98</sup> Evidence of mental disease that does not rise to the level of insanity, i.e., that which is a partial defense or a mitigating factor may reduce either the charge or the sentence for a defendant found guilty.<sup>99</sup>

Why does the law recognize insanity or mental illness as a factor in determining guilt or sentence? In theory, insanity defenses are allowed

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93. SICHEL & DRISCOLL, *supra* note 26, at 251.

94. Monique Angle, *Houston Woman's Case Points Spotlight on Illness-Mother Treated for Depression*, USA TODAY, June 22, 2001, at 2A.

95. The national murder rate for 2000 as reported by the FBI was 5.5/100,000 inhabitants, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR 2000, available at [http://www.fbi.gov/ucr/cius\\_00/00crime2\\_3.pdf](http://www.fbi.gov/ucr/cius_00/00crime2_3.pdf) at 14-15.

96. Postpartum Psychosis may also be used to counter the voluntary action requirement of a charged offense. Due to psychosis the sufferer did not commit the *actus reus* of the crime charged-no voluntary act occurred. This is called the "automaton" defense. See Lt. Col. Michael J. Davidson, *Feminine Hormonal Defenses: Premenstrual Syndrome and Postpartum Psychosis*, ARMY LAW 5, 17-19 (2000).

97. Denno, *supra* note 77, at 84.

98. *Id.*

99. *Id.*

because society recognizes that a mentally ill person may not meet the culpability requirements to be held criminally liable for his or her actions.<sup>100</sup> Criminal law presumes that individuals are responsible actors and their behavior results from free will.<sup>101</sup> If, however, circumstances indicate that an actor did not act voluntarily or was incapable of acting with a culpable mind, due to a mental disease or disorder, the law should treat that actor differently. Additionally, it does not serve any of the traditional goals of the criminal justice system, namely utility, deterrence, retribution and rehabilitation, for the law to treat a mentally ill person like a person without mental illness.<sup>102</sup> As noted in *M’Naghten’s Case*,<sup>103</sup> the source for the traditional common law insanity defense:

[n]ow, it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground upon which the law proceeds.<sup>104</sup>

In practice, insanity defenses are “infrequently used, difficult to prove, rarely successful, and often controversial.”<sup>105</sup> On a national scale, probably no more than 0.25% of terminated felony prosecutions result in acquittals on the basis of insanity.<sup>106</sup> The defendant must meet the jurisdictional standard for legal insanity where she is being tried. Unfortunately, there is no uniform standard for legal insanity in the U.S.<sup>107</sup> The specific problems that postpartum psychosis presents under our jury system only compound the confusion.

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100. *Id.*

101. *Id.* at 120.

102. DRESSLER, *supra* note 16, at 314-316. “A person who does not know what she is doing or who cannot control her conduct cannot be deterred by the threat of criminal sanction.” *Id.* at 314.

103. *M’Naghten’s Case*, 8 Eng rep. 718 (1843).

104. *Id.*

105. Davidson, *supra* note 96, at 19.

106. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 955 (6th ed. 1995).

107. Matters of criminal law and procedure have traditionally been left to the determination of states, unless the Constitution or the legislature specifically vests power in the federal government for a specific offence. Therefore, it is up to each state legislature and judiciary to determine their state’s jurisdictional test for insanity or mental illness (if they retain one). FRANK W. MILLER, ROBERT O. DAWSON et al., *CRIMINAL JUSTICE ADMINISTRATION* 10-11 (5th ed. 2000).

### *B. Postpartum Psychosis and Insanity Tests in the U.S.*

The defense of insanity or mental illness has received inconsistent treatment by U.S. courts.<sup>108</sup> Courts have historically used one of the following tests to determine legal insanity: the M’Naghten test, the “irresistible impulse” test, the “product” or Durham test, the American Law Institute’s Model Penal Code test or the federal statutory definition test.<sup>109</sup> All these tests for insanity have been problematic in practice, partly due to the ideological differences between the disciplines of law and psychiatry.<sup>110</sup> Insanity is a legal term of art, not a psychiatric term with a discrete definition.<sup>111</sup>

In response to debate in recent years, some jurisdictions have outlawed the defense altogether.<sup>112</sup> Rather, evidence of mental illness may be presented to negate the element of intent that the prosecution must prove.<sup>113</sup> Short of the complete defense of insanity, some states allow for the partial defense of “Diminished Capacity,” which takes into account the defendant’s emotional state. This may reduce a murder charge to manslaughter.<sup>114</sup> Additionally, thirteen states have adopted the controversial verdict “guilty but mentally ill”, which provides the jury the option of assigning criminal liability while at the same time recognizing that a defendant’s actions may have been influenced by mental disease or defect.<sup>115</sup>

#### *1. The M’Naghten Test*

The traditional common law test for insanity is the M’Naghten Test<sup>116</sup> which which has been stated as:

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108. DRESSLER, *supra* note 16, at 309.

109. Barton, *supra* note 12, at 597. *See also generally* DRESSLER, *supra* note 16, at 316.

110. *See generally* Peter R. Dahl, *Comment: Legal and Psychiatric Concepts and the Use of Psychiatric Evidence in Criminal Trials*, 73 CAL. L. REV. 411 (1985).

111. *Id.*

112. *See* IDAHO CODE § 18-207 (1996); MONT. CODE ANN. § 46-14-102 (1996); N.D. CENT. CODE § 12.1-04.1-0 (1985); UTAH CODE ANN. § 76-2-305 (Supp. 1990). For a survey and criticism of the arguments for abolishing the insanity defense, *see* Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 SO. CAL. L. REV. 777 (1985). *See also* John Monahan, *Abolish the Insanity Defense? Not Yet*, 26 RUTGERS L. REV. 719 (1973).

113. *See, e.g.*, State v. Searcy, 798 P.2d 914 (Idaho 1990).

114. DRESSLER, *supra* note 16, at 335-345.

115. DRESSLER, *supra* note 16, at 332.

116. *See M’Naghten’s Case*, 8 Eng. Rep. 718.



[A] person is insane if, at the time of her act, she was laboring under such a defect of reason, arising from a disease of the mind, that she: (1) did not know the nature and quality of the act she was doing; or (2) if she did know it, she did not know that what she was doing was wrong, i.e., the accused at the time of the act did not know the difference between right and wrong.<sup>117</sup>

This test has been widely and severely criticized for a variety of reasons.<sup>118</sup> Courts have struggled to define “wrong.” Does the test refer to knowledge of a legal wrong or a moral wrong?<sup>119</sup> In most cases, the defense of postpartum psychosis does not fare well under this test. The defense must prove by a preponderance of the evidence that the mother did not know she was killing her child, or if she did know, she did not know that killing her child was wrong.<sup>120</sup> When a mother has killed her child, it is often very difficult for a jury to believe either requirement of the defense.<sup>121</sup> Dissatisfaction with inconsistent application, interpretation and results of the M’Naghten standard has led to the promulgation of other tests.<sup>122</sup>

## 2. Alternatives to M’Naghten: “Irresistible Impulse” and “Product” Tests

Two alternative tests are the “irresistible impulse” and “product”(Durham)<sup>123</sup> tests. The “irresistible impulse” test broadened the

117. DRESSLER, *supra* note 16, at 319.

118. *Id.* at 320-21.

119. Compare *State v. Crenshaw*, 659 P.2d 488 (Wash. 1983) (Washington Supreme Court upholds defendant’s conviction for the murder of his wife, despite the fact that the defendant’s religious beliefs dictated he kill his wife if she committed adultery, stating that the defendant knew his acts were illegal) with *People v. Serravo*, 823 P.2d 128 (Colo. 1992) (Colorado Supreme Court interprets the statutory test for insanity based on M’Naghten “incapable of distinguishing right from wrong” to refer to a cognitive inability to distinguish right from wrong under existing societal standards of morality).

120. DRESSLER, *supra* note 16, at 314.

121. Maria Vogel-Short, *Postpartum Depression; Making of a New Defense*, NEW JERSEY LAWYER, July 30, 2001, at 1. “Most of the challenge for the defense lawyer involves his presentation of facts...[a] jury sees a woman who has recovered from her illness, because the psychosis goes away...[t]he challenge...is to help explain how these women could do what they did.” *Id.*

122. DRESSLER, *supra* note 16, at 320.

123. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954), *overruled by United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

M’Naghten rule by adding a third prong containing a volitional element.<sup>124</sup> A person is insane if he or she acted due to an uncontrollable and irresistible impulse so that the act is involuntary, inevitable and completely beyond the actor’s control.<sup>125</sup> The publication of the Model Penal Code led to a decrease in the usage of the “irresistible impulse” test.<sup>126</sup> This left the “product” test. The “product” test states that a defendant must be excused for her unlawful act if that act was the product of a mental disease or defect.<sup>127</sup> This test is not currently in force in any state, but its rationale has influenced the drafting of subsequent standards. Both the “irresistible impulse” and “product” tests have proven as problematic as the M’Naghten test. As a result, the American Law Institute developed yet another test.

### 3. The Model Penal Code’s Formulation

The American Law Institute recommended a test for insanity in the Model Penal Code (hereinafter MPC test). MPC section 4.01(1) provides that “a person is not responsible for her criminal conduct if, at the time of the conduct, as a result of mental disease or defect, she lacked substantial capacity to: (1) appreciate the criminality of her conduct or (2) to conform her conduct to the requirements of the law.”<sup>128</sup> The MPC test gained wide acceptance after its publication in 1962; in fact, by 1980, roughly fifty percent of the states and all but one of the federal circuits had adopted the test.<sup>129</sup> This test too, however, is problematic for the postpartum psychosis defense.

### 4. The “Federal Test”

In 1984 the U.S. Congress passed a statute that defines the “federal test” for insanity. The action was prompted by heated debate over perceived leniency in the insanity law after John Hinckley was deemed insane and sentenced to treatment in a mental hospital for his assassination attempt on President Reagan.<sup>130</sup> The Hinkley jury applied the MPC test, which was the law in the majority of jurisdictions at that time.<sup>131</sup>

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124. DRESSLER, *supra* note 16, at 321-23.

125. *Id.*

126. *Id.*

127. *Id.*

128. MODEL PENAL CODE § 4.01(1). Twenty-two states currently use the Model Penal Code test, KADISH & SCHULHOFER, *supra* note 106, at 954.

129. KADISH & SCHULHOFER, *supra* note 106, at 948.

130. *Id.*

131. *Id.*

The federal test excuses a defendant if “at the time of the commission of the acts constituting the offense . . . as a result of a severe mental disease or defect, [she] was unable to appreciate the nature and quality or the wrongfulness of [her] acts.”<sup>132</sup> This is a more difficult test to satisfy than the M’Naghten, MPC, Durham or irresistible impulse standards because the mental disease must be “severe” and the defendant must prove her insanity by clear and convincing evidence (rather than the traditional preponderance burden).<sup>133</sup> Since then, states have struggled to come up with alternative tests for legal insanity to provide juries.

### 5. *The “Guilty But Mentally Ill” Verdict*

The “guilty but mentally ill” verdict is one state response to the inadequacy of the federal test for legal insanity. In the eleven states that have adopted the controversial “guilty but mentally ill” verdict, a jury may choose among guilty, not guilty, not guilty by reason of insanity and guilty but mentally ill.<sup>134</sup> A defendant deemed guilty but mentally ill receives the sentence that would otherwise be imposed if she were found guilty; however, she may receive psychiatric care in the prison or in a mental hospital as part of the sentence.<sup>135</sup> Critics of the verdict say that it is the worst of both worlds, because it recognizes that a mental disability played a role in the offense, yet holds the sufferer responsible and punishes her in essentially the same way as any cold-blooded murderer.<sup>136</sup>

### 6. *Diminished Capacity*

Other states recognize a diminished capacity defense.<sup>137</sup> Aside from insanity, a defendant may be able to plead diminished capacity in order to mitigate her guilt. The diminished capacity defense is as fraught with inconsistency as the insanity defense. A defendant who pleads diminished capacity asserts that although she does not meet the insanity standard, she should be held less criminally culpable because the act was committed as a result of “extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”<sup>138</sup> Depending on the jurisdiction, a finding of diminished capacity may be a complete defense, resulting in an

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132. 18 U.S.C. § 17(a) (2000).

133. 18 U.S.C. §§ 17(a) and 17(b)(2000).

134. DRESSLER, *supra* note 16, at 332.

135. *Id.*

136. *Id.*

137. DRESSLER, *supra* note 16, at 335.

138. MODEL PENAL CODE § 210.3(1)(b). *See* DRESSLER, *supra* note 16, at 342.

outright acquittal, or may be a partial defense or mitigating factor, resulting in conviction on a lesser included offense or shorter sentence.<sup>139</sup> The diminished capacity defense is another mechanism through which an infanticidal mother, who suffered from postpartum psychosis at the time of the offense, could receive a mitigated sentence.

### 7. The Insanity Law Reform Debate

Insanity law has always been a controversial topic in criminal law. It is important to note, however, that there are alternatives to adhering to old tests that provide inconsistent results. Some have argued that perhaps none of the tests give significant guidance to jurors, "or that jurors often respond to considerations other than those that are legally relevant."<sup>140</sup> For decades, some jurists have argued "insanity should have nothing to do with the adjudication of guilt but rather should bear upon the disposition of the offender after conviction."<sup>141</sup> The following argument highlights the difficulty in codifying psychiatric standards: "If the law resists corresponding change in order to avoid impairment of its policy objectives, it risks becoming locked into a system that may rapidly become outdated. The law may find itself asking psychiatrists to testify about distinctions that no longer make psychiatric sense."<sup>142</sup> Critics stress the inherent difficulty in giving psychiatric terms legal effect.

Notwithstanding the debate over abolishing insanity defenses, jurists have also confronted the unique practical, evidentiary problems associated with raising an insanity defense. A determination of what is admissible expert testimony in the psychiatric realm can be problematic because of the nature of psychiatry and because psychiatric testimony often goes to the heart of the case, i.e. whether the defendant had the necessary intent to commit the charged offense.

The Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*<sup>143</sup> defined the role of the trial judge and listed factors that may be considered in determining the admissibility of expert testimony. Congress specifically addressed the problem of expert psychiatric testimony in Federal Rule of Evidence 704(b), which states the following:

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139. Barton, *supra* note 12, at 601-602.

140. KADISH & SCHULHOFER, *supra* note 106, at 956.

141. Joseph Weintraub, *Comment: Insanity As A Defense: A Panel Discussion*, Annual Judicial Conference, Second Judicial Circuit of the United States, 37 F.R.D. 365, 369 (1964).

142. Dahl, *supra* note 110, at 428.

143. 509 U.S. 579 (1993).

[n]o expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.<sup>144</sup>

Therein lies the rub. Juries are the ultimate triers of fact, and they must diagnose a defendant, often choosing between dueling experts. This was the situation in the *Yates* case.<sup>145</sup> Again, if postpartum psychosis was better researched, experts could give jurors the guidance they need to make informed decisions.

It is important to note that these cases, as with other cases in which mental illness is an issue, are extremely fact-sensitive. Whether a postpartum psychotic mother pleads insanity or diminished capacity, her success is hardly predictable. Even in cases where the facts are compelling, the law is extremely inconsistent in its treatment of such defendants charged with killing their children.<sup>146</sup> The following cases illustrate this reality.

### C. A Survey of Case Law<sup>147</sup>

Due to the fact that many states still adhere to the M'Naghten standard in whole or in part,<sup>148</sup> there are numerous examples of unsuccessful attempts at pleading insanity by postpartum psychosis under this standard. For example, Heather Clark, who abandoned her infant in the desert, was convicted under Nevada law of attempted murder despite the testimony of two psychiatrists and one psychologist stating that she suffered from severe postpartum depression.<sup>149</sup> In *Commonwealth v. Reilly*,<sup>150</sup> the defendant was found guilty of third degree murder despite the testimony of two mental health experts who described her as incapable of

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144. FED. R. EVID. 704(b).

145. Terri Langford, *Doctor: Yates Suffered From More Than Postpartum*, DALLAS MORNING NEWS, Mar. 4, 2002, at 1.

146. Barton, *supra* note 12, at 593.

147. For other cases where postpartum depression/psychosis was at issue, see *State v. White*, 456 P.2d 797 (Id. 1969), *People v. Molina*, 202 Cal. App. 3d 1168 (1988), *Vaughan v. Commonwealth*, 376 S.E.2d 801 (Va. 1989), *State v. Holden*, 365 S.E.2d 626 (N.C. 1988), and *State v. Barsness*, 473 N.W.2d 325 (Minn. 1991).

148. "By one recent count, 21 states now adhere to some form of the M'Naghten rule." KADISH & SCHULHOFER, *supra* note 106, at 954.

149. *Clark v. State*, 588 P.2d 1027 (Nev. 1979).

150. *Commonwealth v. Reilly*, 549 A.2d 503 (Pa. 1988).

understanding the nature and quality of killing her newborn, and that the act itself was wrong.<sup>151</sup>

The guilty but mentally ill verdict has not been a successful alternative for postpartum psychotic defendants either. The case of Sharon Comitz is a good example.<sup>152</sup> Comitz, reportedly suffering from postpartum psychosis, killed her newborn by throwing him into a stream.<sup>153</sup> The trial court found that Comitz was not severely mentally disabled, and sentenced her to eight to twenty years in prison under a guilty but mentally ill verdict.<sup>154</sup> This outcome highlights the irony of such a verdict, in that a defendant can be deemed mentally ill, but yet receive as harsh a prison sentence as a defendant without a mental illness.

In another recent case, an Indiana mother was convicted of drowning her child, and the appeals court upheld that conviction despite evidence from four expert witnesses that the defendant suffered from severe postpartum psychosis.<sup>155</sup> She is now serving a forty-year prison term.

In sharp contrast to the aforementioned cases, some infanticidal mothers who assert postpartum depression have received acquittals, or alternatively, more lenient sentences based on insanity.<sup>156</sup> Consider the cases of Sheryl Massip, Latrena Pixley and Ann Green, all of whom asserted postpartum psychosis as the basis for insanity defenses. A California judge set aside a jury's guilty verdict of Sheryl Massip, and directed a verdict of not guilty by reason of insanity based on evidence she suffered from severe postpartum depression at the time of the killing.<sup>157</sup> A D.C. Superior Court judge sentenced Latrena Pixley, a mother convicted of murdering her newborn, to serve 156 weekends in jail.<sup>158</sup> Ann Green, who suffocated two of her children and attempted to suffocate a third, was found not guilty by reason of insanity, and was sentenced to outpatient

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151. *Id.*

152. 530 A.2d 473, 474 (Pa. Super. Ct. 1987).

153. *Id.*

154. *Id.*

155. *Gambill v. State*, 675 N.E.2d 668 (Ind. 1996).

156. *Barton*, *supra* note 12, at 605-606.

157. *People v. Massip*, 271 Cal. Rptr. 868 (Cal. Ct. App. 1990). On the day Massip ran over her infant with her car, she had heard voices telling her that her son was the devil. *Id.* at 875.

158. *See No Justice for the Dead Baby: The Pixley Case*, WASH. TIMES, Feb. 1, 1997, at C9.

psychiatric evaluation.<sup>159</sup> These cases highlight the disparate results defendants who assert postpartum psychosis have received.

*D. Andrea Yates: A Perfect Example of the Tragedy of Postpartum Psychosis*

The recent and well-documented case of Andrea Yates has brought the issue of postpartum depression to the forefront of public debate, as well as in the medical and legal communities.<sup>160</sup> On June 20, 2001, after her husband had gone to work, Yates filled the bathtub with water and methodically drowned each of her five children, ages six months to seven years.<sup>161</sup>

Yates was charged with two counts<sup>162</sup> of capital murder, and pled not guilty by reason of insanity due to postpartum psychosis.<sup>163</sup> On March 12, 2002, after seventeen days of testimony from thirty-eight witnesses, the jury of eight women and four men convicted Yates on both counts, after deliberating for just three and a half hours.<sup>164</sup>

The key issue in the case was whether Yates' well-documented postpartum psychosis met the jurisdictional test for insanity. Texas subscribes to a scaled down M'Naghten test. To prove insanity, the defense must show that the defendant did not know her actions were wrong (contrary to the law).<sup>165</sup> Yates reportedly drowned the children because she believed she had Satan inside her<sup>166</sup> and that killing them was

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159. For an in-depth discussion of the *Green* case, see Laura E. Reese, *Comment: Mothers Who Kill: Postpartum Disorders and Criminal Infanticide*, 38 UCLA L. REV. 699 (1991).

160. For two common opposing perspectives compare Brian Doherty, *Editorial: Forgive and Forget? Depression No Excuse for Killing*, DAILY NEWS OF LOS ANGELES, June 24, 2001, at V3, with Liza M. Gould, *Editorial: Depression After Delivery*, WASH. POST, July 4, 2001, at A18.

161. Paul Duggan, *Texas Mother Convicted of Murder*, WASH POST, Mar. 13, 2002, at A1.

162. The state did not prosecute Yates for two of the deaths, apparently to give themselves the opportunity for "a second bite at the apple" should their first prosecution of Yates have failed. See Bill Jeffreys, *Hearing Reveals Possible Strategy in Yates Case*, TEXAS LAWYER Dec. 10, 2001, at 1.

163. *Id.*

164. *Id.*

165. Ed Timms & Diane Jennings, *Verdict is No Surprise Given Texas Laws, Legal Experts Say*, DALLAS MORNING NEWS, Mar. 13, 2002, at 1.

166. Texas does not allow for the "Deific Decree" Exception, i.e. a person is insane and therefore excused from criminal responsibility if they commit an act believing it to be the direct command and will of God for them to do so, regardless

the only way to ensure they would go to heaven.<sup>167</sup> The State conceded that Yates suffered from a severe mental disease but argued that because she knew that killing her children was against the law, she should be held criminally responsible for her actions.<sup>168</sup> Prosecutor Joe Owmbly stated in his closing argument, “[S]he may have believed it was in the best interest of the children to drown them one after the other, but that’s not the law in Texas.”<sup>169</sup> An attorney for Yates, George Parnham, countered in his closing argument, “if this lady does not meet the definition of insanity, no one does, and we should wipe it off the books.”<sup>170</sup> Many critics of the verdict echoed this argument.<sup>171</sup>

Unfortunately for Yates, the law in Texas also does not allow the jury to know the result of an acquittal on insanity grounds.<sup>172</sup> Texas jurors are not aware that a defendant is subject to extensive long-term commitment in a psychiatric hospital should they acquit on insanity grounds.<sup>173</sup> If acquitted by reason of insanity, Yates would have been evaluated at a civil commitment proceeding. This could have resulted in her spending as much time in a psychiatric facility as she would have spent in prison as the result of a guilty verdict.<sup>174</sup> Arguably, the Yates jurors were not aware of this fact. Advocates for the mentally ill and defense attorneys maintain that jurors may have been influenced towards conviction due to an unfounded fear that Yates would be set free if acquitted.<sup>175</sup>

During sentencing, the jurors had to decide whether Yates would receive the death penalty or life in prison for the deaths of her children.

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of their knowledge of its illegality. See KADISH & SCHULHOFER, *supra* note 106, at 941. “[O]ne who believes that he is acting under the direct command of God is no less insane because he nevertheless knows murder is prohibited by the laws of man. Indeed, it may actually emphasize his insanity” State v. Cameron, 674 P.2d 650, 654 (Wash. 1983).

167. Timms & Jennings, *supra* note 165.

168. *Id.*

169. Pam Easton, *Yates Convicted in Child Drownings*, DALLAS MORNING NEWS, Mar. 12, 2002 at 1.

170. Christopher L. Tritico, *Real Culprit in Yates Case is the System*, TEXAS LAWYER, Mar. 29, 2002, at 39.

171. See, e.g., Paul Burka, *It's Crazy: Andrea Yates and the Insanity of the Insanity Defense*, TEXAS MONTHLY, July 2002, at 8; Christopher Caldwell, *Insanity on Trial: Andrea Yates Was Insane and Everybody Knew It*, WEEKLY STANDARD, Mar. 25, 2002, at 14.

172. Timms & Jennings, *supra* note 165.

173. *Id.*

174. Tritico, *supra* note 170.

175. *Id.*



Notably, the prosecution presented no new evidence during the sentencing hearing.<sup>176</sup> The defense, however, presented several witnesses to support the argument that Yates' history of mental illness should be considered as "mitigating evidence."<sup>177</sup>

The defense presented evidence to suggest that virtually all the risk factors for postpartum psychosis were present in Yates' case. Specifically, she had a well-documented history of mental health problems.<sup>178</sup> She was a diagnosed schizophrenic;<sup>179</sup> had suffered from postpartum depression after the birth of at least two of her children<sup>180</sup> and had been hospitalized twice in 1999 after attempting suicide.<sup>181</sup> In 2001, she was under the care of a psychiatrist who prescribed a combination of drugs, including the powerful anti-psychotic drug, Haldol.<sup>182</sup> She reportedly had limited support from family and friends at this time,<sup>183</sup> and a friend testified that she appeared isolated in the home.<sup>184</sup> In March of 2001, following the birth of her fifth child, her father died.<sup>185</sup> Shortly thereafter, Yates fell into a deep depression.<sup>186</sup> She was hospitalized for depression for twelve days in March, and then again in May. In early June, her psychiatrist, Dr. Mohammed Saeed, took her off Haldol, believing she had improved.<sup>187</sup>

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176. Anne Belli Gesalman & Lynette Clemetson, *Death or Life Sentence?* NEWSWEEK, Mar. 13, 2002, at 1.

177. Anne Belli Gesalman, *A Dark State of Mind*, NEWSWEEK, Mar. 4, 2002, at 32.

178. *Id.* A prison psychiatrist who interviewed Yates extensively after the deaths, Dr. Melissa Ferguson, testified for the defense, stating "[o]f all the patients I've treated for major depression with psychotic features, she was one of the sickest." *Id.*

179. Anne Belli Gesalman, *Death or Life Sentence?* NEWSWEEK, Mar. 13, 2002, at 1.

180. *Id.*

181. *Id.*

182. *Id.*

183. See generally ASSOCIATED PRESS, *Yates Sentenced to Life as Family Debates Blame*, WASH. POST, Mar. 19, 2002, at A6.

184. See generally Anne Belli Gesalman, *Clashing in Court: Husband and Best Friend at Odds Over Timing of Treatment for Andrea Yates*, NEWSWEEK, Mar. 4, 2002, at 1. Debbie Holmes even kept a diary of Yates' deteriorating mental health, at the urging of her sister, "in case something bad happened." *Id.*

185. Anne Belli Gesalman, *A Dark State of Mind*, NEWSWEEK, Mar. 4, 2002, at 32.

186. *Id.*

187. *Id.*

Two days after her last appointment with Dr. Saeed, she killed her children.<sup>188</sup>

After deliberating for only thirty-five minutes, the jury decided to spare Yates' life, sentencing her to a minimum of forty years in prison before the possibility of parole.<sup>189</sup> If her appeal fails,<sup>190</sup> she will be seventy-seven years old by the time she is eligible for release.<sup>191</sup>

#### *E. The International Perspective: Courts Treatment of Postpartum Depression in Other Countries*

Had these cases been tried in almost any other Western nation, the outcome would have been radically different. Statutes in England, Canada, Australia and twenty-seven other countries rule out murder charges in cases of infanticide and instead impose sentences of probation and counseling.<sup>192</sup> Such statutes stand in sharp contrast to statutes in Texas, New Jersey and Delaware which define the killing of a child as a capital crime.<sup>193</sup> For example, in England postpartum psychosis is a defense for infanticide of a child until the child reaches the age of two.<sup>194</sup> Certainly what is just in each case is a question of specific fact, but other countries presume a mother to be mentally ill if she commits infanticide within a specified period of time.<sup>195</sup> Indeed, no such presumption protects American women under the law, or in the mind of the average American juror.<sup>196</sup>

188. *Id.*

189. Anne Belli Gesalman & Lynette Clemetson, *A Crazy System*, NEWSWEEK, Mar. 25, 2002, at 30.

190. Yates's attorneys have already filed a notice of appeal. They cite two likely grounds for appeal: references in the testimony to the television series "Law and Order", and insanity law in Texas. See Erica Lehrer Goldman, "Law and Order" Episode May Figure Into Yates Appeal, TEXAS LAWYER, Apr. 8, 2002, at 8.

191. Jennifer Frey, *A Grey End to Tragedy; In Houston, A Sentence Concludes the Drama of Andrea Yates's Story*, WASH. POST, Mar. 16, 2002, at C1.

192. Greenberg & Springen, *supra* note 34.

193. See TEX. PENAL CODE ANN. § 19.03(a)(8)(1998); DEL. CODE ANN. tit. 11 § 4209(e)(1)(5)(1995); N.J. STAT. ANN. § 11-3c(4)(k)(1997).

194. Kevin Anderson, *Analysis: U.S. Law and Infanticide*, BBC NEWS (June 22, 2001), available at <http://news.bbc.co.uk/1/hi/world/americas/1401667.stm>.

195. See, e.g., Infanticide Act, 1938, 1 & 2 Geo. 6, ch. 36, § 1.

196. As one defense attorney puts it "[s]ome jurors' reactions will be 'Oh my God, it's such a horrible crime that she has to pay for it...,' [a]nd some jurors will have the opposite reaction: '[i]t's such a horrible crime, she must have been out of her mind'". REPUBLIC NEWS SERVICES, *Depression Defense Called Risky: Legal*

The healthcare systems of other countries have also been prompt in establishing diagnostic and treatment standards for postpartum depressive disorders. England, for instance, has set up early and mandatory screening programs and established treatment facilities that specialize in these disorders.<sup>197</sup>

#### IV. POSTPARTUM PSYCHOSIS: A VIABLE DEFENSE?

Commentators have argued both for and against the creation of a specific postpartum psychosis defense to infanticide.<sup>198</sup> The use of a diagnosis of postpartum psychosis is not new to American courts: Courts admitted evidence of postpartum psychosis, as early as the 1950's to support an insanity defense.<sup>199</sup> The strongest argument for an independent defense, either established by case law or statute, is that it would provide a just legal option for women who truly suffer from the disorder.<sup>200</sup> The best arguments against the creation of an independent defense cite the possibility of abuse by non-sufferers, and suggest that to validate the defense would be to slide down a slippery slope away from personal responsibility.<sup>201</sup> These arguments can be countered by the assertion that if the defense was validated, courts or legislatures could create specific mechanisms to curb abuse. For example, statutes could delineate diagnostic guidelines or require experts to certify that a defendant suffered from postpartum psychosis before a defendant will be allowed to assert the defense.

Short of being established as an independent defense in infanticide cases, postpartum psychosis should at least be recognized under the law as other mental disorders have been and treated with some semblance of consistency. Post Traumatic Stress Disorder,<sup>202</sup> Battered Spouse Syndrome (BSS),<sup>203</sup> and Premenstrual Syndrome<sup>204</sup> were all highly controversial when

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*Experts Speculate in the Case Against Houston Woman*, ARIZONA REPUBLIC, June 24, 2001, at A4.

197. Smith, *supra* note 46.

198. Barton, *supra* note 12, at 604.

199. *Id.* See also *People v. Skeoch*, 96 N.E.2d 473 (Ill. 1951).

200. Barton, *supra* note 12, at 617.

201. *Id.*

202. See C. Peter Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior*, 25 B.C.L. REV. 305 (1984).

203. See *State v. Kelly*, 478 A.2d 364 (N.J. 1984).

204. Premenstrual Syndrome has been accepted as a defense in England, but has only been successful in one U.S. case, *Commonwealth v. Richter*, No. T90-215256 (Fairfax County Gen. Dist. Ct. June 4, 1991) (unreported case) (court

they first emerged as defenses; yet all have been grudgingly validated by some courts, and used to mitigate or avoid criminal responsibility for a sufferer. Postpartum Psychosis is conceptually no different from these.

In the case of BSS, some jurisdictions have passed statutes specifically allowing the defense to present expert testimony on the disorder.<sup>205</sup> This can be a model for the treatment of postpartum psychosis under the law. BSS is most often raised as a justification defense, i.e., self-defense; however, it has been used successfully a number of times as the basis for an insanity defense.<sup>206</sup> Certain elements of postpartum psychosis merit special consideration under the law. Only women can suffer from the disorder. In addition, women are far less likely to commit homicide than men, and, when they do, their victims are usually their own children. Women are far less likely to re-offend, especially those who suffered from postpartum psychosis at the time of the first offense.<sup>207</sup> Sufferers of postpartum psychosis only seem to hurt themselves or their children if they become violent.<sup>208</sup> Because they do not present a real threat to the general public, society should not incarcerate them, but rather should commit them to a hospital where they can be treated and those individuals at risk can be protected. The commitment of a defendant found "not guilty under an insanity analysis provides a ready means to protect society from the truly dangerous."<sup>209</sup> "The defendant's period of dangerousness is temporary" because postpartum psychosis is short term and highly responsive to treatment.<sup>210</sup> Courts and juries should not incarcerate a

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concluded defendant was not guilty of driving while intoxicated based in part on her use of PMS to explain her abusive behavior towards the arresting police officer). See also Christina L. Hosp, Note, *Has the PMS Defense Gained a Legitimate Toehold in Virginia Criminal Law?*, 14 GEO. MASON L. REV. 427 (1991). Postpartum psychosis has also been compared to the "male" defense of steroid-induced disorder. Denno, *supra* note 77 at 144.

205. See, e.g., CAL. EVID. CODE § 1107(b)(2001) ("Expert opinion testimony on battered women's syndrome shall not be considered a new scientific technique whose reliability is unproven"); MO. REV. STAT. § 563.033 (Supp. 1999) (Evidence the actor was suffering from the battered spouse syndrome shall be admissible upon the issue of whether the actor lawfully acted in self-defense"); and OHIO REV. CODE ANN. § 2901.06 (1991 Supp).

206. See generally Elizabeth Schneider, *Describing and Changing: Women's Self-Defense Work and the Problems of Expert Testimony on Battering*, 9 WOMEN'S RIGHTS L. RPTR. 195, 211-212 (1986).

207. SICHEL & DRISCOLL, *supra* note 26, at 251.

208. Denno, *supra* note 77, at 142-143.

209. Dahl, *supra* note 110, at 427.

210. Denno, *supra* note 77, at 143.

postpartum psychotic mother for the rest of her life, or worse, execute her, because of a brief, horrible moment when she had no awareness or control over her actions. A just society would treat women as it does other defendants who were mentally ill when they committed their crimes.

## V. MOVING TOWARDS A PLAN OF ACTION

Postpartum depressive disorders are a real problem in our society. Unfortunately, they have not been recognized as such by the medical and legal communities to any uniform degree. The medical community should remedy this by increased funding for research, increased education of health care providers and the general public and the development and standardization of preventative, diagnostic and treatment tools.<sup>211</sup> Education and research are the least controversial methods to affect societal change. The U.S. Congress has recently made a significant step in this direction.

### *A. New Federal Legislation Mandating Research into Postpartum Depressive Disorders and Treatment Options*

The Melanie Stokes Postpartum Depression Research and Care Act<sup>212</sup> was introduced in the Senate on October 11, 2001. The bill has been referred to the Senate Committee on Health, Education, Labor and Pensions.<sup>213</sup> The bill is a proposed amendment to the Public Health Service Act.<sup>214</sup> It mandates the National Institutes of Health to develop a research plan relating to postpartum depression and psychosis, including research into the etiology of the disorders, epidemiological studies to determine frequency and prevalence, the development of improved diagnostic techniques, development and evaluation of treatment and prevention programs, and development of educational programs for practitioners and

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211. Awareness of postpartum depressive disorders has prompted some non-profits to fund education programs in communities. For instance, in the Washington D.C. metropolitan area Healthy Start recently awarded a \$700,000 grant to the Family Mental Health Foundation of Washington, D.C. to establish routine screenings for postpartum depression in primary care settings. Smith, *supra* note 46, at C5.

212. S. 1535, 107th Cong. (2001).

213. See Bill Summary & Status for the 107th Congress, Melanie Stokes Postpartum Depression Research Care Act, S. 1535, 107th Cong.(2003), at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN01535@@@X>.

214. *Id.*

the general public.<sup>215</sup> Sen. Durbin of Illinois, co-sponsor of the Senate bill with Sen. Fitzgerald, stated the following in his introduction of the act:

While postpartum depression is a widespread problem, there are currently few research studies looking into its causes and there is currently no standard treatment for women suffering from this disorder. Given the lack of coordination amongst those interested in understanding and treating such a widespread problem, science and medicine have made few inroads into helping the many women and their families carrying the burden of postpartum depression. This legislation seeks to rectify this situation.<sup>216</sup>

The act is not without its critics, who cite the difficulty in determining what the best screening devices and treatment should be, and determining who would be held ultimately responsible for problems.<sup>217</sup> These logistical concerns do not overshadow the need for research and standardization of treatment within the medical community. Indeed, the actions proposed in the bill are desperately needed to better understand, prevent and treat postpartum depressive disorders.

In response to the Stokes Act and the recent Safe Motherhood Act for Research and Treatment,<sup>218</sup> the Senate Committee on Appropriations recommended funding allocated to the Department of Health and Human Services for increased research and education concerning postpartum depressive disorders.<sup>219</sup> The Committee put forth a "Safe Motherhood Initiative," providing three million dollars to "the Office of Women's Health to establish an Interagency Coordinating Committee on Safe Motherhood."<sup>220</sup> This committee "shall evaluate existing research and health promotion programs and their success in serving pregnant women."<sup>221</sup> The committee will also develop a five-year federal research and strategic action plan, including research into postpartum conditions.<sup>222</sup> The Appropriations Committee noted that although postpartum depressive disorders occur frequently, "little systematic research has been

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215. S. 1535, 107th Cong., § 409I(2)(a)-(f).

216. 147 Cong. Rec. S10648 (daily ed. Oct. 11, 2001)(statement of Sen. Durbin).

217. Brenda Warner Rotzoll, *Rush Backs Bill for Moms with Postpartum Psychosis*, CHI. SUN-TIMES, July 4, 2001, at 48.

218. S. 2328, 107th Cong. (2002) (Also known as the "SMART Mom Act").

219. S. REP. NO. 107-216 (2002) available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_reports&docid=f:sr216.107.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_reports&docid=f:sr216.107.pdf).

220. *Id.* at 13.

221. *Id.*

222. *Id.*

done to uncover the underlying causes and to develop effective treatments.”<sup>223</sup> Therefore, the Committee recommended expanded, intensified and coordinated research on postpartum depression and psychosis.<sup>224</sup> In addition, the committee encouraged the National Institutes of Health to convene a national research conference to develop a national research plan for postpartum depression and psychosis.<sup>225</sup>

### *B. Suggested Approaches for State Governments*

In addition to federal action, state governments should also attack the problem through statutes, by requiring hospitals and health care providers to create mandatory training programs for obstetric personnel. Furthermore, state governments could publish and distribute information regarding postpartum depression to mothers pre-discharge, and/or to design and implement “incident response” resources for those mothers who request help. Some state legislatures have already taken action in the wake of recent publicity concerning postpartum depressive disorders. For example, the Illinois General Assembly recently passed an act directing the Illinois Department of Human Services to develop an informational brochure regarding postpartum depression for distribution through health care providers to new mothers.<sup>226</sup> The New Jersey legislature recently made findings that postpartum depression is a serious illness requiring further attention in the public and the medical community.<sup>227</sup>

It is far more difficult to design and implement a standardized treatment of postpartum psychosis in the legal community. Criminal law is traditionally a state issue;<sup>228</sup> each state is permitted to create and retain inconsistent and ineffective methods for dealing with mentally ill perpetrators. Short of a national outcry for standardization, insanity laws will most likely remain inconsistent between jurisdictions. However, with increased knowledge about postpartum depression comes wider acceptance in the medical community.<sup>229</sup> Perhaps that will mean judges and juries will give more credence to expert testimony regarding postpartum psychosis.

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223. *Id.* at 154-155.

224. *Id.* at 155.

225. *Id.*

226. 2001 Ill. ALS 649, 2001 Ill. SB 1782 (2001).

227. N.J. STAT. §§ 26:2-175 & 26:2-176 (2002).

228. MILLER, *supra* note 107.

229. See, e.g., AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 386 (4th ed. 1994).

## VI. CONCLUSION

Postpartum depressive disorders are serious and complex mental illnesses that require immediate treatment. Still, relatively little is known about them in the general public and the medical community. This ignorance only exacerbates the tragedy of maternal infanticide. The legal system has no standardized method for dealing with mentally ill mothers who kill their children. Women have killed, and will continue to kill their children because they suffer from postpartum psychosis. Melanie Stokes and Andrea Yates should have received the treatment they so direly needed. Mothers suffering from debilitating postpartum psychosis who kill their children are not any more sane than schizophrenics who kill as a result of paranoid delusions. The law must protect the innocent and the vulnerable. Practically, this means not only identifying and treating postpartum depressed mothers, before they descend into madness and possibly harm their children. It also means recognizing that warehousing mentally ill mothers in prisons, or worse, executing them, serves no valid societal or legal goal.



